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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-902

FLORIDA MINING & MATERIALS CORP.,
d/b/a McCORMICK CONCRETE COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 12, 1973, and order denying rehearing *en banc*, entered on October 24, 1973.

OPINIONS BELOW

The NLRB Regional Director's Report on Objections and Recommendations to the Board is unreported; it is reproduced in pertinent part *infra* at pp. 15-24 of Appendix A.

The Decision and Certification of Representative by the National Labor Relations Board summarily adopting the Regional Director's report is unreported; it is reproduced *infra* at pp. 25-27 of Appendix A. The employer refused to bargain in order to contest the above certification.

The Decision and Order of the National Labor Relations Board summarily ordering Petitioner to bargain with the union is reported at 198 NLRB No. 81, 80 LRRM 1848, and is set forth at pp. 28-39 of Appendix A hereto.

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 481 F.2d 65, 83 LRRM 2793, and is reproduced at pp. 40-50 of Appendix B hereto. The Decision of the Court of Appeals denying rehearing *en banc* is reported at ..... F.2d ....., and is reproduced at p. 51 *infra* of Appendix B. The Judgment of the Court of Appeals dated November 1, 1973, is reproduced at p. 52 *infra*.

JURISDICTION

The Judgment of the Court of Appeals was entered July 12, 1973; a timely petition for rehearing *en banc* was denied on October 24, 1973. The petition for certiorari is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether failure to disclose to employees voting in a representation election that the union on the ballot had been placed in trusteeship the day before the election destroyed "laboratory conditions" surrounding such election and deprived employee-voters of the opportunity to register a free and informed choice concerning a bargaining representative so as to invalidate the election? This involves the following subquestions:

(a) Whether the fact of trusteeship of the union is a "significant" fact in the choice to be made by the voters?

(b) Whether there is an affirmative duty on the union which possesses exclusive knowledge to disclose the fact of trusteeship?

(c) Whether, absent a duty to disclose the fact of trusteeship, this change in conditions unknown to the voters destroys the "laboratory conditions" which the NLRB purports to insist upon?

(2) Whether the denial of Employer's requests for a hearing on its objections violates the Board's own regulations, 29 CFR § 102.69(c) and due process requirements of the United States Constitution?

STATUTES AND REGULATIONS INVOLVED

Section 9(c) (1) of the National Labor Relations Act, 49 Stat. 453, 29 U.S.C. § 159(c) (1) (set forth in full in Appendix C, at p. 53 *infra*) requires the National Labor Relations Board to conduct secret ballot elections to determine whether employees desire a particular collective bargaining agent to represent them.

The Rules and Regulations of the National Labor Relations Board, Series 8, as amended, § 102.69, 29 CFR § 102.69 (also printed in pertinent part at p. 59 in Appendix C) sets forth the procedure to be followed in resolving objections to the election or to conduct affecting the results of the election.

The Labor Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 522 (quoted in pertinent part at Appendix C, pp. 54-55), 29 U.S.C. § 411, sets forth a Bill of Rights of members of labor unions, includ-

ing particularly the right to vote in secret ballot elections on union officers, union dues, etc. The union members' rights to elect officers by secret ballot elections are further codified in 29 U.S.C.A. § 481. These rights are suspended during trusteeship of a local union by its parent union; trusteeships are regulated under 29 U.S.C.A. §§ 461-466.

STATEMENT OF THE CASE

Pursuant to a petition by Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, the National Labor Relations Board scheduled a secret ballot election for September 23, 1971, among the employees of McCormick Concrete Company to determine whether they wanted Local 512 to be their collective bargaining representative. Unknown to the employer or to the employees who were eligible to vote in the election, Local 512 was placed under trusteeship by the International Brotherhood of Teamsters on September 22, 1971, the day before the election. The trusteeship was imposed because of internal strife and racial discord and financial mismanagement within the Local. The situation was so grave that the Trustee told local newspapers (after the election) that he had doubts whether the Local would be able to continue in existence.

A union meeting of the employer's employees had been scheduled at the union hall for the night before the election, but it was cancelled by the union. Neither the fact of the trusteeship nor the underlying conditions within Local 512 were known to the employees or the employer until picketing of the union hall by some union members alerted the local newspapers to the situation.

After the trusteeship and the conditions causing it became known, three employees signed affidavits swearing that they had voted for the union and that they and many

others would not have voted for the union had they known of the trusteeship and problems within Local 512 at the time of the election; their votes would have reversed the results of the election. Other employees refused to reveal how they voted but signed sworn affidavits stating they were misled and that they at least wanted a rerun election.

All of the above facts are undisputed. The employer's timely objections to the election based on the unknown trusteeship situation were investigated *ex parte* by the Regional Director. He found that Local 512 was not defunct and was still able and willing to represent employees even after the imposition of trusteeship. He further found that a labor organization under trusteeship is not prohibited from filing petitions or otherwise acting as a labor organization. The Regional Director, therefore, overruled the objection in its entirety, and refused to direct any hearing on the issue.

The National Labor Relations Board adopted the Regional Director's report and certified Local 512 as the exclusive representative of McCormick's employees. The Board's subsequent Order that McCormick recognize and bargain with Local 512 was enforced by the decision of the United States Court of Appeals for the Fifth Circuit, pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C.A. § 160(e) and (f).

The trusteeship was terminated May 9, 1973.

REASONS FOR GRANTING WRIT

The decision below should be reviewed because it adopts and enforces statements and policy decisions of the National Labor Relations Board which are in basic conflict with the statutory policy expressed in the Labor Management Reporting and Disclosure Act of 1959 and

which conflict with the Board's own stated policies and regulations. These conflicts involve important questions of federal labor law which have not been, but should be, settled by this Court.

The Court of Appeals correctly stated the Board's position as follows:

> According to the Board, the consequences of a trusteeship are not of a type which will likely affect the voter's choice. The Board feels that the only relevant factor to the voting employee is the hope of direct benefits flowing to the individual from the ability to deal collectively and thus more equally with management. As long as a union in trusteeship can function as a bargaining agent, the employees have all they want. The Board goes so far as to argue that studies of employee nonparticipation amply illustrate that democratic participation in union affairs is not an important concern of voters. (Appendix pp. 45-46)
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> * * *
>
> The Board also seems to have relied on a feeling that election procedures and evaluation of various campaign propaganda statements illustrate that the choice of a local would be basically irrational. Furthermore, the Board maintains that generally the employees are only interested in obtaining better benefits and conditions from collective action while at the same time weighing possible harm from long strikes or loss of good relations with management. Therefore, the Board argues that the imposition of a trusteeship which still allows these basic roles to be maintained has relatively little impact on employee voting. To support this thesis the Board points to articles which have dealt with the difficulties of

unions in getting members to attend meetings and take an active part in union affairs. (Appendix p. 49)

The Court of Appeals cnforced this position of the Board—that employee voters are only interested in money for themselves and they don't care what local union they have, or who controls that union or how it is run.

(1) The Board's conclusion that the fact of trusteeship was not a "significant" fact for the employee voters to consider in choosing a union to represent them is in conflict with the basic principles of the Labor Management Reporting and Disclosure Act and the National Labor Relations Act.

The Courts should not permit the agency entrusted with administering federal labor laws to operate on such a thesis and to conduct democratic elections under 29 U.S.C. § 159(c) accordingly. Why hold elections at all if the choice of the employee voters is "basically irrational"? Why have any rules concerning misrepresentations to the voters if their choice of a bargaining agent is "basically irrational"? Why have a Bill of Rights for members of labor organizations guaranteeing those members the right by secret ballot to elect officers, levy dues, and otherwise control their local unions, 29 U.S.C. § 411, if employees choosing that union as their exclusive bargaining agent don't care whether they have such rights, all of which are suspended by trusteeship? Why regulate the imposition of trusteeships, 29 U.S.C. §§ 461-465, and zealously guard the local union's right to a fair hearing before such democratic processes are suspended and trusteeship is imposed if the local union members don't care who controls their local? See *Jolly* v. *Gorman*, 428 F.2d 960 (5th Cir. 1970); *Plentty* v. *Laborers International Union*, 302 F.Supp. 332 (D. Pa. 1969); *Telephone Workers Local*

No. 2 v. *International Brotherhood of Telephone Workers,* 261 F.Supp. 433 (D. Mass. 1966). Why have laws that prohibit Communists or convicted felons from being union officers, 29 U.S.C.A. § 504, if the members represented by the union don't care who runs the union?

The courts have required the NLRB to conduct representation proceedings in conformity with other federal laws. In *NLRB* v. *Mansion House Corp.*, 473 F.2d 471 (8th Cir. 1973), the Board was required not to certify unions which practice racial discrimination as determined from principles established in the enforcement of Title VII of the Civil Rights Act of 1964.

The position taken by the NLRB in this case is in such conflict with basic principles of federal labor law that it does constitute an abuse of discretion by the Board in conducting representation elections under 29 U.S.C. § 159(c). American workers and American labor laws are interested in maintaining democratic processes as to who controls local labor unions and how they are operated so as to make the fact of trusteeship and suspension of legally guaranteed union democratic processes a "significant" factor to workers exercising their statutory choice of a collective bargaining agent.

The Board's position that trusteeship is an insignificant fact to the voters is belied by its earlier decision to set aside an election in *United States Gypsum Co.*, 130 NLRB 901 (1961) because the employer misrepresented that "The International Boss has all authority and control" when in fact the local was not in trusteeship. Similarly, misrepresentations of other internal union matters have been sufficient to upset elections. *NLRB* v. *Winchall Processing Corp.*, 451 F.2d 306 (9th Cir. 1971); *Graphic Arts Finishing Co.* v. *NLRB*, 300 F.2d 893 (4th Cir. 1967);

Tyler Pipe Industries v. *NLRB*, 447 F.2d 1136 (5th Cir. 1971).

(2) The NLRB administers Section 9(c) elections without imposing any affirmative duty on the employer or union to disclose any facts. It argues that an affirmative duty to disclose *any* facts would be difficult to administer and might be abused by employers and unions seeking to overturn lost elections. Both these reasons should be soundly rejected by this Court in establishing standards to govern the NLRB in the representation elections. "Arguments that tribunals are too busy to do their duty, cf. *La Buy* v. *Howes Leather Co.*, 1957, 352 U.S. 49, 77 S.Ct. 309, 1 L.Ed.2d 290, or that it is more expeditious not to recognize rights, are not agreeable ones." *NLRB* v. *Trancoa Chemical Corp.*, 303 F.2d 456, 461-62 (1st Cir. 1962).

The Board can require, and in fact has required, affirmative disclosure in representation elections. In *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), it determined after more than thirty years of conducting such elections that fair exchange of information to the voters prior to the election would be assisted by imposing an affirmative duty on employers to disclose to unions prior to the election the names and addresses of all eligible voters. The Board has had no great difficulty administering this rule and it is certainly capable of setting further standards of affirmative disclosure, either through published rules or in case-by-case determinations.

Similarly, the Board requires parties to 9(c) elections to take affirmative action to disavow or correct misrepresentations made by others and for which it is not culpable. *Staub Cleaners, Inc.*, 171 NLRB 332 (1968), enf'd, 418 F.2d 1086 (2nd Cir. 1969) (rumor did not affect elec-

tion because employer and union took affirmative action to disavow it); *Air Control Products*, 147 NLRB 1229 (1964) (election set aside because employer failed affirmatively to disavow statement in union handbill).

Likewise, the courts should not accept the Board's argument that the voters' right to information should be sacrificed because a few parties may attempt to abuse a guarantee of such rights. The Board and Courts now prohibit affirmative misrepresentations made shortly before the election so that the other party has no opportunity to respond. *Celanese Corporation of America* v. *NLRB*, 291 F.2d 224 (7th Cir. 1961), *cert. denied*, 368 U.S. 925 (1961). *National Cash Register Co.* v. *NLRB*, 415 F.2d 1012 (5th Cir. 1969).

Because puffery is openly allowed in such campaigns and because electioneering continues right up until the election, the possibility of violations and abuses of this rule are unlimited. But in practice both parties are generally more careful in the campaign statements just prior to the election because the potential denial of election victory to any party that violates it.

When violations of this rule are charged, the Board now makes determinations of what information is significant to the voters, whether the statements were true. The Board and the Courts now cope with any abuses of this rule; neither has indicated a willingness to abolish the rule and to allow voters to be misled by affirmative misrepresentation just because of enforcement difficulties or potential abuses. This Court should require the Board to apply the same standards to information which is known to only one party and which would clearly influence the voters in their choice, particularly as here where the information became available shortly before the election

with no opportunity for the other party to inform the voters.

(3) The Board has long asserted that representation elections are conducted in "laboratory conditions", *General Shoe Corp.*, 77 NLRB 124, 127 (1948) which are "conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. . . . When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again." The Board has also held that when "laboratory conditions" are destroyed by the actions of persons other than the participating employer, employees and union, the election must, nevertheless, be rerun. *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953). Culpability of a party is not required; the Board's stated goal is to determine the "free and informed" choice of the workers. *Home Town Foods, Inc.* v. *NLRB*, 379 F.2d 241, 244 (5th Cir. 1967); second appeal 416 F.2d 392 (5th Cir. 1969); *Athbro Precision Engineering Co.*, 166 NLRB 966 (1967); *Henry I. Siegel, Inc.*, 165 NLRB 493 (1967). Even if the union in the instant case is not guilty of affirmative acts of concealment by cancelling the pre-election meeting at the union hall where the trusteeship would be revealed, the fact of trusteeship should be considered such an intervening event as to require disclosure by the union before the election or rerunning the election after it was known by all parties and disclosed by the employer to the voters. This case is a peculiarly appropriate opportunity for this Court to clarify the limits of the Board's discretion in administering its "laboratory conditions" policy, especially because the Board assumed in this case that the employees' choice would be "irrational." The Act provides that employees should have representatives "of their own choosing", 29

U.S.C. § 157. *NLRB* v. *Trancoa Chemical Corporation*, 303 F.2d 456, 460 (1st Cir. 1962). This Court should set standards by which that statutory command is to be carried out.

(4) This is also an appropriate case for this Court to examine the recurring issue of when a hearing is required under NLRB Rules and Regulations § 102.69(c), 29 CFR § 102.69(c). In this case Petitioner contended that the Union's actions cancelling a pre-election meeting at the union hall where the trusteeship notice was required to be posted was concealment equivalent to affirmative misrepresentation.

The Court of Appeals held, in rejecting this argument:

> The only evidence [to show that any scheduled meeting was cancelled] consisted of form affidavits signed by three employees to the effect that the employees had heard there was going to be a meeting about the election on that night but that it had been cancelled. We agree that there is insufficient evidence to show an affirmative representation in this case. (Appendix p. 44)

The Court of Appeals did not consider the denial of the hearing Petitioner had requested of the Regional Director to develop this proof.

Of course, any other information concerning the scheduling of a meeting and how and why it was cancelled was in control of the union business agents. Because there is no discovery proceeding available to employer without a hearing, the only means Petitioner had of developing facts in possession of the union is through subpoena of documents and witnesses at a hearing scheduled by the Regional Director. Thus, the Board denied the hearing at which full proof could be developed that argued to the Court that Petition had failed to prove misrepresentation,

even though the available evidence raises a prima facie case of affirmative misconduct by the union to conceal the trusteeship.

See *Home Town Foods, Inc.* v. *NLRB*, 379 F.2d 241, 242 (5th Cir. 1967). It is, therefore, appropriate for this Court to review this case to set out minimal standards for the Board in acting on disputed issues of fact without granting a hearing to the persons affected by such agency action.

CONCLUSION

The questions presented by this case are of great and recurring significance in the administration of federal labor laws. The National Labor Relations Board conducted 9,020 conclusive elections in fiscal 1972, involving 597,794 workers. Thirty-Seventh Annual Report of the National Labor Relations Board, pp. 20, 242 (1972). The effects of potential intervening events and significant facts which might be the subject of affirmative disclosure in order to give the voters an *informed* choice are involved in all these representation elections.

The Board's radical position in direct conflict with the clear principles of the Labor Management Reporting and Disclosure Act in order to avoid requiring disclosure in this case makes this case a peculiarly appropriate opportunity for this Court to review the standards of disclosure required in Section 9(c) representation elections and to require the National Labor Relations Board to conduct such elections on the basis (a) that the voters are reasonable, intelligent persons whose democratic choice will be rational, and (b) that such rational voters must be informed of certain events or facts or the party refusing to disclose such facts and winning the election will be denied the fruits of its concealment.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN BACHELLER, JR.
CHARLES KELSO
FISHER & PHILLIPS

By .....
Counsel for Petitioner Florida Mining & Materials Corp.

3500 First National Bank Tower
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

Pursuant to Rule 33 (3) (c), I hereby certify that on this 7th day of December, 1973, I served by United States Air Mail, postage prepaid, three (3) copies of the foregoing Petition for a Writ of Certiorari on each of the following persons:

Solicitor General
Department of Justice
Washington, D. C. 20530

Office of the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

Thomas A. Larkin, Esquire
400 East Duval Street
Jacksonville, Florida 32202

.....

APPENDIX

APPENDIX A

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

Case No. 12-RC-3905

McCORMICK CONCRETE CO., INC.
Employer

and

TRUCK DRIVERS, WAREHOUSEMEN & HELPERS LOCAL UNION NO. 512, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA
Petitioner

Report on Objections and Recommendations to the Board

Pursuant to a Stipulation for Certification Upon Consent Election approved by the undersigned Regional Director on August 17, 1971, an election by secret ballot was conducted on September 23, 1971, under the supervision and direction of the undersigned, among certain employees employed by McCormick Concrete Co., Inc. (herein referred to as Employer), in the unit found appropriate as

set forth in the aforesaid stipulation[1] to determine whether or not said employees desired to be represented for purposes of collective bargaining by Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (herein referred to as Petitioner).

At the conclusion of the election, the parties were furnished a Tally of Ballots which showed the following:

Approximate number of eligible voters	40
Void Ballots	0
Votes cast for Petitioner	21
Votes cast against participating Labor Organization	15
Valid votes counted	36
Challenged Ballots	5
Valid votes counted plus challenged ballots	41

Challenged ballots are not sufficient in number to affect the results of the election. On September 30, 1971, the Employer timely filed with the undersigned Objections to the Election, herein referred to as Objections, and served a copy thereof upon the Petitioner.

The Objections allege the following:

OBJECTION 1

On September 22, 1971, the day prior to the election the Petitioner-Union was put into trusteeship by

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1. The unit description is as follows: "All mixer drivers, concrete, sand and rock truck drivers, maintenance personnel and warehouse deliveryman, employed by the Employer at its Jacksonville, Florida Plants (6), and Jacksonville Beach, Florida plant (1). *Excluding*: all office clerical employees, guards, professional employees ,salesmen, and supervisors as defined in the Act.

the International Union* all of which occurred without the knowledge or consent of Employer's bargaining unit employees who cast their ballots in the Board election the very next day.

OBJECTION 2

Prior to the election, Petitioner-Union and its agents, made representations to the bargaining unit employees that Petitioner-Union could adequately represent the employees as their bargaining representative and that Petitioner-Union was financially able to carry on its duty of representation if so elected, when, in fact, neither representation was true.

OBJECTION 3

The bargaining unit employees who voted on September 23, 1971, erroneously assumed they were casting their ballots for or against a certain labor organization, to-wit, Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a labor organization not under trusteeship, when in fact, such employees were casting their ballots for or against a labor organization that had, within the previous twenty-four hours, been placed under trusteeship by the International Union. Such bargaining unit employees erroneously assumed that they were casting their ballots for or against a labor organization not in trusteeship, which labor organization would be controlled by certain business agents and elected officials during the course of collective bargaining when in

*See newspaper clipping from The Florida Times-Union, September 30, 1971, attached hereto and marked Exhibit "A".

fact such individuals were removed from office within one week after the Board election. The bargaining unit employees were led to believe by officials and agents of Petitioner-Union that such officials and agents were qualified and capable of giving proper representation to the employees, when in fact such Union officials were not so qualified.

OBJECTION 4

Subsequent to July 14, 1971, officials and agents of Petitioner-Union made statements to bargaining unit employees that unless such employees selected Petitioner-Union as their bargaining representative, Employer herein would suffer loss of business to other organized employers, thus causing economic loss to bargaining unit employees.

OBJECTION 5

Subsequent to July 14, 1971, Petitioner-Union made, or caused to be made, threatening telephone calls to bargaining unit employees, including such threats as that families of bargaining unit employees would be injured if they continued to speak against Petitioner-Union.

In submitting the aforenoted Objections, the Employer has requested the Board to conduct an investigation of the Objections, including the holding of a hearing on said Objections.

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of the issues raised by the Objections has been conducted under the supervision and direction of the undersigned, who having afforded the parties full oppor-

tunity to present and submit evidence on the issues, and having considered all the evidence, concludes and recommends as follows:

INVESTIGATIONAL FACTS AND CONCLUSIONS

Objections 1, 2 and 3:

These Objections will be discussed and considered together as they pertain to interrelated incidents bearing on the fact that, effective September 22, 1971, Teamsters Local No. 512, the Petitioner, was put under temporary Trusteeship of International Brotherhood of Teamsters Chauffeurs, Warehousemen & Helpers of America, pending a hearing to consider evidence on whether the temporary Trusteeship should be continued or dissolved.

A copy of the Notice, dated September 21, 1971, sent to Local No. 512, by the office of Frank E. Fitzsimmons, General President of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is attached hereto as Exhibit "B".

The evidence is, as shown by Exhibit "B", that Trusteeship was imposed by the International over Local Union No. 512 effective September 22, 1971. Further, the evidence is that E. M. Belflower, Business Agent and organizer for Local 512, and who filed the Petition for election with the Employer, was still employed by the Union on the day of the election and in fact was the Union representative present at the count of ballots at the close of the election, and received a copy of the Tally of Ballots for the Petitioner. Additionally, James Carpenter, President of Local 512, was still active as President and Business Agent on September 23rd, the date of the election, and was not removed from office and employment with Local 512 until September 24, 1971. On September 24, when he

was terminated from his positions by J. W. Morgan, an International Vice President for the International Union, and supervisor of all I.B.T. Locals in the Florida region, Morgan told Carpenter that he would rehire him as a Business Agent effective the following Monday, September 27th. Carpenter reported for work as a Business Agent on the 27th but resigned that same day when he found out that Morgan had also rehired Henry Baker, a former Business Agent for Local 512 whom Carpenter had fired about a year previously.

Attached hereto as Exhibit "C" is a notice dated September 30, 1971, in which the International Union set the hearing date of October 19, 1971, when a panel appointed by the International considered and heard evidence with respect to the imposition of the Trusteeship on Local 512 to determine whether the temporary Trusteeship should be continued or dissolved. Morgan testified that although he initially had some doubts about the Union's continued existence as a local he has since resolved these doubts in favor of its continued existence as Local 512, and has recommended to the International panel at the Hearing on October 19 that it be continued as a Local Union. Morgan made this recommendation on the basis of the desire of the membership to remain a Local Union even if additional dues became necessary to continue its existence as a Local Union. Morgan testifies that under Trusteeship Local 512 has functioned and does function as a labor organization with no change except that different individuals are performing its functions. Local 512 has continued to administer its contracts, including the processing of grievances filed before the imposition of trusteeship. Morgan further testifies that there is no thought of bankruptcy and Local 512 is presently paying the salaries of its employees including Business Agents and clerical help, and has also

made payment on bills due, the amounts the Union could presently afford. The Union has continued under trusteeship to make driver referrals to companies requesting drivers.

Local 512 Business Agent J. B. Taylor was terminated September 27, 1971, and rehired September 30th. Taylor, along with former agent E. M. Belflower, was active in the McCormick Concrete Company election campaign. As an example of the Union's continued representation of employees, both before and after the imposition of trusteeship, Taylor submitted a copy of a grievance in existence since June 10, 1971, against Commercial Carriers Corp., which grievance was unable to be settled at the various steps in the Local level grievance procedure and ultimately referred to the South-Central Automobile Transporters panel, made up of both Union and Management representatives, which meeting was attended by Taylor in Atlanta, Georgia, on October 14.

With respect to the allegations embraced on Objections 1, 2 and 3, the evidence is that those employees of Local 512 who were involved in the election campaign with the Employer's employees were still employed on the day of the election and one, J. B. Taylor, although terminated subsequent to the election, has since been rehired and is functioning in the same position of Business Agent that he previously held. From the evidence, it appears that the Union has continued to function as a labor organization, willing and able, to represent employees. It is noted that the Union's name as it appeared on the Stipulation for Certification Upon Consent Election agreement, on the Notice of Election and on the Ballots used at the election is that of Truck Drivers, Warehousemen & Helpers Union Local 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of

America. Local 512, although presently under a trusteeship, is nonetheless continuing to function as Local 512, and as a part of the Teamster Union, and that the imposition of the trusteeship on the Local by the International does not materially change the issue on which the McCormick employees voted, i.e., that whether or not they wish to be represented by the Teamsters as a labor organization.[2] Regarding Objection No. 2, it is the conclusion of the undersigned that the petitioning Union was able and willing both before and after imposition of trusteeship, to represent employees as their bargaining representative with respect to this Employer. Further, the Board has held that mere temporary inability to function does not constitute defunctness.[3] With respect to Objection No. 3, it should be noted that the Stipulation for Certification Upon Consent Election, the Notice of Election and the Ballot, all contained the name of the labor organization for which the employees were voting, and not the names of any particular individuals, agents, or officials. The Act does not preclude a labor organization which is operating under a trusteeship from filing petitions, or otherwise fully exercising all privileges and rights under the Act to which labor organizations are entitled, nor in this instance does there appear to be evidence that the Petitioner cannot or is in any way unwilling, while still under trusteeship, or at any other time, to fully perform its duties and functions as a bargaining representative.[4]

It is the conclusion of the undersigned, based on all the foregoing, that, whether considered separately or col-

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2. *Sunbeam Corporation*, 89 NLRB 469, 472; *Westinghouse Electric Corporation*, 119 NLRB 1858, 1862.

3. *Hershey Chocolate Corporation*, 121 NLRB 901, 911.

4. *Terminal System, Inc.*, 127 NLRB 979; *Jat Transportation Corp., et al.*, 128 NLRB 780, 782.

lectively, there is no merit in Objections 1, 2 or 3. Accordingly, the undersigned will recommend that Objections 1, 2 and 3 be *overruled* in their entirety.

Objections 4 and 5:

The Employer's request of October 8, 1971, to withdraw its Objections 4 and 5 is herewith approved.

In reaching the conclusions hereinabove set forth, regarding Objections 1, 2 and 3, the undersigned has not found it necessary to resolve any existing evidentiary conflicts since the evidence submitted in support of Objections 1, 2 and 3 (Exhibit "A") is not disputed. Further, there is no evidence that Local 512 under trusteeship has ceased to function as a labor organization representing employees. Therefore, the undersigned is not persuaded that a hearing is warranted, or that it would serve any useful purpose. Under the circumstances, the undersigned will recommend that the request for hearing in this matter be denied.

CONCLUSIONS AND RECOMMENDATIONS

In accordance with aforesaid conclusions, it is recommended that the Employer's request for a hearing on the Objections be denied and that Objections 1, 2 and 3 being without merit, be *overruled* in their entirety.[5]

The election having been conducted in accordance with the Stipulation for Certification Upon Consent Election, and the Board's Rules and Regulations, and having recommended that the Objections be overruled in their entirety, and the Petitioner having secured a majority of the valid

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5. Withdrawal of Objections 4 and 5 was hereinabove approved.

votes cast, it is further recommended that the Petitioner be certified as the exclusive representative of the employees within the bargaining unit herein involved as set forth hereinabove in footnote 1, for purposes of collective bargaining.

As provided in Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party desiring to take exception to this report and recommendation may, within ten days from the date of issuance hereof, file with the Board in Washington, D. C., eight (8) copies of such exceptions. Immediately upon filing of such exceptions, the party filing shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director for Region 12, National Labor Relations Board, 706 Federal Building, 500 Zack Street, Tampa, Florida 33602.

DATED AT Tampa, Florida, this 16th day of November, 1971.

/s/ Harold A. Boire
Regional Director National Labor
Relations Board, Region 12
706 Federal Building
500 Zack Street
Tampa, Florida 33602

Jacksonville, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12-RC-3905

McCORMICK CONCRETE CO., INC.
Employer

and

TRUCK DRIVERS, WAREHOUSEMEN & HELPERS LOCAL UNION No. 512, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA
Petitioner

Decision and Certification of Representative

Pursuant to a Stipulation for Certification Upon Consent Election, a secret-ballot election was conducted among the employees in the stipulated unit described below. The tally of ballots furnished the parties showed that of approximately 40 eligible voters, 41 cast ballots, of which 21 were for, and 15 against, the Petitioner. There were 5 challenged ballots, which were insufficient to affect the results. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

On November 16, 1971, the Regional Director issued and served on the parties his Report on Objections, and Recommendations recommending that the objections be overruled in their entirety and Petitioner be certified as the exclusive collective-bargaining representative in the stipulated unit. Thereafter, the Employer filed timely ex-

ceptions to the Regional Director's report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The parties stipulated and we find that the following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All mixer drivers, concrete, sand and rock truck drivers, maintenance personnel and warehouse deliveryman, employed by the Employer at its Jacksonville, Florida Plants (6), and Jacksonville Beach, Florida Plant (1); excluding all office clerical employees, guards, professional employees, salesmen, and supervisors as defined in the Act.

5. The Board has considered the objections, the Regional Director's Report, and the Employer's exceptions

and brief, and hereby adopts the Regional Director's findings, conclusions, and recommendations.

As the Petitioner has received a majority of the valid ballots cast, we shall certify it as the exclusive bargaining representative of the employees in the unit found appropriate.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America has been designated and selected by a majority of the employees in the unit found appropriate in paragraph 4, above, and that, pursuant to Section 9(a) of the Act, the said labor organization is the exclusive representative of all such employees for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Dated, Washington, D.C., January 18, 1972.

Edward B. Miller, Chairman
Howard Jenkins, Jr., Member
Ralph E. Kennedy, Member

(Seal) National Labor Relations Board

D—6513
Jacksonville, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12—CA—5519

FLORIDA MINERAL & MATERIALS CORP., d/b/a McCORMICK CONCRETE COMPANY

and

TRUCK DRIVERS, WAREHOUSEMEN & HELPERS LOCAL UNION No. 512, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

Decision and Order

Upon a charge filed on February 24, 1972, by Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, and duly served on McCormick Concrete Co., Inc., the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a complaint on March 30, 1972, an amendment to the complaint on April 12, 1972, and a second amendment to the complaint on April 17, 1972. The complaint, as amended, alleged that Florida Mining & Materials Corp., d/b/a McCormick Concrete Company, herein called the Respondent,[1] had engaged in and was engaging

1. At the time of the election in the underlying representation proceeding, Case 12-RC-3905, McCormick Concrete Co., Inc., was the Employer of the unit employees. For reasons explained, *infra*, the party identified in the complaint, as amended, as the Respondent in the proceeding is Florida Mining & Materials Corp., d/b/a McCormick Concrete Company.

in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, amendments, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint, as amended, alleges in substance that on January 18, 1972, following a Board election in Case 12—RC—3905 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2] and that, commencing on or about January 21, 1972, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 11, 1972, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and thereafter filed an answer to the amendment to the complaint.

On May 5, 1972, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 11, 1972, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

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2. Official notice is taken of the record in the representation proceeding, Case 12-RC-3905, as the term "record" is defined in Secs. 102.66 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 165 NLRB 938, enfd. 383 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151; *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its memorandum in opposition to the General Counsel's Motion for Summary Judgment, Respondent denies that the Union is the exclusive majority bargaining representative of the employees in the unit found to be appropriate in Case 12—RC—3905.[3] Respondent further alleges that the General Counsel's motion seeks to deny it the right to a hearing in violation of due process. We find no merit in Respondent's position.

Pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on September 23, 1971. The tally of ballots showed that of approximately 40 eligible voters, 41 cast ballots of which 21 were for and 15 against the Union with 5 ballots challenged. Thereafter timely objections to conduct affecting the results of the election were filed. The objections alleged in substance that on the day before the election the petitioning local was put into trusteeship by the International Union without the knowledge or consent of the bargaining unit employees;

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3. The election herein was conducted on September 23, 1971, among employees of McCormick Concrete Co., Inc., herein called McCormick. The complaint, as amended, alleges, Respondent's answer admits, and we find that on or about December 1, 1971, Respondent purchased certain assets of McCormick, and has since that date operated the ready-mix business of McCormick in essentially the same business manner and has employed substantially the same employees and supervisors as had been employed by McCormick and, further, that since on or about December 1, 1971, Respondent has been and is a successor to the operation of McCormick involved herein.

that the Union misrepresented its financial ability to represent the employees; and that officials and agents of the petitioning local were represented to be qualified to give proper representation to employees when in fact they were not so qualified. After investigation, the Regional Director issued a Report on Objections and Recommendations to the Board in which he recommended that the objections be overruled and that the Union be certified as the exclusive collective-bargaining representative of employees in the stipulated unit.

Thereafter, timely exceptions to the Regional Director's Report on Objections and Recommendations were filed with the Board in which the merits of the objections were reargued. On January 18, 1972, the Board issued its Decision and Certification of Representative in which, after considering the objections, the Regional Director's report, and the exceptions, it adopted the Regional Director's findings, conclusions, and recommendations and certified the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board

4. See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a Florida corporation with its office and principal place of business in Jacksonville, Florida, where it engages in the manufacture and sale of ready-mixed concrete. During the past year it furnished material to contractors engaged in work on federally funded projects and purchased goods, supplies, and materials valued in excess of $50,000 from suppliers who received such goods, supplies, and materials directly from outside the State of Florida.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All mixer drivers, concrete, sand and rock truck drivers, maintenance personnel and warehouse deliveryman, employed by the Respondent at its Jacksonville, Florida Plants (6), and Jacksonville Beach, Florida Plant (1), excluding all office clerical employees, guards, professional employees, salesmen, and supervisors as defined in the Act.

2. The certification

On September 23, 1971, a majority of the employees in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 12 designated the Union as their representative for the purpose of collective bargaining. The Union was certified as the collective-bargaining representative of the employees in said unit on January 18, 1972, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 18, 1972, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 21, 1972, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to rec-

ognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since January 21, 1972, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith

with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Florida Mining & Materials Corp., d/b/a/ McCormick Concrete Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All mixer drivers, concrete, sand and rock truck drivers, maintenance personnel and warehouse deliveryman, employed by the Respondent at its Jacksonville, Florida Plants (6), and Jacksonville Beach, Florida Plant (1), excluding all office clerical employees, guards, professional employees, salesmen, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 18, 1972, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 21, 1972, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Florida Mining & Materials Corp., d/b/a McCormick Concrete Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All mixer drivers, concrete, sand and rock truck drivers, maintenance personnel and warehouse de-

liveryman, employed by the Respondent at its Jacksonville, Florida Plants (6), and Jacksonville Beach, Florida Plant (1), excluding all office clerical employees, guards, professional employees, salemen, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plants in Jacksonville and Jacksonville Beach, Florida, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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5. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., July 31, 1972.

Edward B. Miller, Chairman
Howard Jenkins, Jr., Member
Ralph L. Kennedy, Member
(Seal) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an under-

standing is reached, embody such understanding in a signed agreement. The bargaining unit is:

All mixer drivers, concrete, sand and rock truck drivers, maintenance personnel and warehouse deliveryman, employed by the Respondent at its Jacksonville, Florida Plants (6), and Jacksonville Beach, Florida Plant (1), excluding all office clerical employees, guards, professional employees, salesmen, and supervisors as defined in the Act.

Florida Mining & Materials Corp.,
d/b/a McCormick Concrete
Company
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 706, Federal Office Building, 500 Zack Street, Post Office Box 3322, Tampa, Florida 33602, Telephone 813—228—7227.

APPENDIX B

DECISIONS AND JUDGMENT OF COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2810

FLORIDA MINING & MATERIALS CORP.
d/b/a McCORMICK CONCRETE COMPANY,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Florida Case)

(July 12, 1973)

Before TUTTLE, GODBOLD and MORGAN,
Circuit Judges.

MORGAN, Circuit Judge: The National Labor Relations Board seeks enforcement of its finding that Florida Mining & Materials Corporation violated sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with the certified representative of the employees at its Jacksonville, Florida, plant. Following an

election in an appropriate unit, Local 512 of the Teamsters Union had been selected as the bargaining representative. The company admits it refused to bargain, alleging that the refusal was necessary to obtain a court test of the propriety of the selection of Local 512. The challenge to certification was based on a single issue in connection with the representative election. If the Board resolved that issue properly, enforcement of this bargaining order must be granted.

This case turns on the resolution of a single extremely complex issue. The National Labor Relations Board has resolved the question in favor of the union, relying heavily on the burden to the administrative process which would allegedly follow from a contra result. We are faced with reviewing the Board's determination to determine its propriety.

I

The union and the company agreed in August, 1971, that a Board supervised consent election would be held on September 23, 1971. On September 22, 1971, the day before the election, the local union received notice from the International Brotherhood that it had been placed under temporary trusteeship pending a full hearing on whether the trusteeship should continue. The existence of this trusteeship and the underlying reasons therefor were not made known to the public, the company, or the voting employees prior to the election. Of the forty-one ballots cast, twenty-one were for the union, fifteen against the union, and five challenged.

The company filed timely objections to the election, alleging that concealment of the trusteeship invalidated the election results and required a rerun election. On November 16, 1971, the Regional Director recommended

that the Board overrule the company's objections and certify the union. The Board adopted the Regional Director's report. The company has refused to bargain since that certification, resulting in this current enforcement proceeding.

II

To gauge the relevance of this imposed trusteeship on the needs and desires of the employees of the company it is necessary to understand the reasons for the trusteeship and the factual background leading to its imposition. The notice sent to the local union by International President Fitzsimmons clearly sets forth the reasons that this step was now being taken. Basically, this notice pointed out that there was an irreconcilable conflict between the top union officers which rendered the local unable to function. The notice further stated that the executive board members had chosen sides and failed to take any action to alleviate the situation. The principal cause of the conflict was alleged to be a racial dispute which was threatening to split the entire local into two distinct camps. The last paragraph of the notice stated:

> Unless immediate action is taken, it cannot be assured that the Local Union will be able to fulfill its duties as bargaining representative or to carry out the other legitimate objects of a labor organization.

International Vice President Joseph Morgan was appointed as trustee.

A few days after assuming the trusteeship Morgan gave an interview to the local newspaper which served as the basis for an article included in the record. This interview showed that the trustee had replaced all officers and business agents of the union. In addition to stating that the union was getting to the point where it could not func-

tion and alluding to recent incidents illustrating the racial conflict, Morgan pointed out that the local also had a debt of at least $18,000.00, which he attributed to financial mismanagement. After pointing out that he had had to make several trips to Jacksonville in trying to settle these internal problems, Morgan stated, with regard to the local: "It has a history of internal political double crossing and now I wonder whether or not it can ever really be straightened out." He also expressed doubt about the continued existence of the local.

The same newspaper article contained a picture and description of picketing at the union headquarters by union members who were greatly disturbed by both the imposition of the trusteeship and the firing of officers and agents. It is obvious that the trusteeship and the underlying causes therefor had a significant and direct impact on the local union members.

III

Thus, we are required to decide if the employees of Florida Mining were, on the facts of this case, in a position to exercise a full and free choice in the selection of their bargaining representative. Was the Board proper in holding this election free from taint because it found that the union under trusteeship could still carry on the functions of a labor organization? That is really the only question in this case.

The company tries to bring this case within the traditional realm of activity requiring rerun elections for the company suggests affirmative misrepresentations by the union. A union meeting was allegedly scheduled with the employees for the night before the election. This meeting was cancelled. The employer argues that the cancellation of this meeting was a deliberate attempt to keep the

employees from learning about the trusteeship, because notice of the existence of the trusteeship would have had to be posted as required for all to see. The company contends that this deliberate attempt to conceal the trusteeship amounts to a misrepresentation.

As the Board points out, there is not sufficient evidence in the record to show that any scheduled meeting was cancelled. The only evidence consisted of form affidavits signed by three employees to the effect that the employees had heard there was going to be a meeting about the election on that night but that it had been cancelled. We agree that there is insufficient evidence to show an affirmative misrepresentation in this case.

The Board seeks to frame the issue posed by this case more precisely. It is their contention that the company is seeking to have the Board adopt a totally new standard which it has never considered in the past. The Board maintains that the only way to cast a suitable rule for this situation would be to inject an "affirmative disclosure" requirement. As the Board points out, such a rule has never been formulated or imposed in any reported case.

The Board argues strongly against such a rule. Its primary reliance is bottomed on the assertion that such a rule would create an unbearable administrative burden in return for only marginal benefit. The Board points out the great difficulty in determining the scope and extent of an affirmative disclosure rule. They suggest that losing parties would be quick to take advantage of any such rule in an effort to avoid the consequences of a free election. In short, they seek to avoid endless litigation on a case by case basis as to what may or may not have been material and what may or may not have been subject to disclosure.

The Board suggests that it is not in a position to supervise and control full and complete disclosure of all facts

which might effect a voting employee. Rather it sees its role as simply to ensure fair play and to act only where a party has affirmatively misrepresented a material fact under circumstances where it is important for the other party to make a meaningful response. Under the campaign processes as they now exist, the competing arguments pro and con on unionization are left to be presented by the parties. The employer, because of supposed financial and entrepreneurial disadvantages flowing from unionization, is assigned the role of bringing the alleged negative aspects of unionization to the attention of the electorate. Likewise, the union is to stress its advantages. The Board, as referee, steps in only in the case of low blows, and even then only when the injured party does not have sufficient time to present a response.

Furthermore, the Board feels that any rule for affirmative disclosure would not return any real benefit. It argues that no one knows what diverse information the electorate might find useful in assessing the pro's and con's of unionism. The Board actually admits that in all likelihood the voter's choice is "too often inescapably nonrational," relying on a noted law review article. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv.L.Rev. 38, 65. Thus, the Board seems to be saying that specific information is rarely, if ever, important to an employee faced with a unionization vote.

Finally, the Board maintains that even if some sort of alternative disclosure should be required, this is not the appropriate case therefor. According to the Board, the consequences of a trusteeship are not of a type which will likely affect the voter's choice. The Board feels that the only relevant factor to the voting employee is the hope of

direct benefits flowing to the individual from the ability to deal collectively and thus more equally with management. As long as a union in trusteeship can function as a bargaining agent, the employees have all they want. The Board goes so far as to argue that studies of employee non-participation amply illustrate that democratic participation in union affairs is not an important concern of voters. We do note, however, that the Board admits the revelation of the trusteeship would have brought to light all of the problems present in the administration of this local.

IV

At the outset, we must point out that the NLRB is given broad discretion in representation matters. *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB* v. *Waterman S. S. Co.*, 309 U.S. 206, 226 (1940); *NLRB* v. *Golden Age Beverage Co.*, 5 Cir. 1969, 415 F.2d 26, 29. The party challenging the results of a representation election has the "heavy" burden (*Shoreline Enterprises of America, Inc.* v. *NLRB*, 5 Cir. 1959, 262 F.2d 933) of showing adequate reasons to set aside the election. *Bush Hog, Inc.* v. *NLRB*, 5 Cir. 1969, 420 F.2d 1266. We also agree that "the results of a secret ballot, conducted under government sponsorship and with all the safeguards which have been developed throughout the years, should not be lightly set aside." *Liberal Market, Inc.*, 108 NLRB 1481 (1954); accord, *NLRB* v. *Zelrich* Co., 5 Cir. 1965, 344 F.2d 1011.

The Board has decided that the employer has failed to show any affirmative misrepresentation by the union on the facts in this election. We are forced to agree with the Board that there was not sufficient evidence to show any such affirmative misrepresentation. Even if cancellation of a scheduled meeting could be a material misrepresentation under the circumstances of this case, a characterization

which we seriously doubt, there is not sufficient evidence to show that such a meeting was scheduled and cancelled. As far as the claim that the union made affirmative misrepresentations about its ability to represent the employees while it was suffering from internal discord, we again must agree with the Board and Regional Director who found that a union in trusteeship, despite some interruption of normal operations, could still function as a viable union organization. Thus, we accept the Board's finding that this union was able to represent these employees while in trusteeship and that any statements prior to the imposition of the trusteeship which indicated that the union could adequately represent these employees could not be considered material misrepresentations.

We come down to basically evaluating the probable impact of the imposition of the trusteeship and the underlying problems in the local which would be publicly disclosed on the choices to be made by the voting employees. In short, our only question is has the Board abused its discretion by holding that imposition of a trusteeship on the eve of an election is not such a significant event that the election must be set aside and a rerun election held? While this is a very close and complex issue involving significant policy judgments, we cannot say that the Board has abused its discretion in refusing to overturn the election and, therefore, we must enforce the bargaining order. We note at this point that this may well be a unique problem which arises only because of the close timing between the imposition of the trusteeship and the election.

Had the trusteeship been imposed a day or two sooner its existence would have almost certainly been publicly known prior to the election. The employees would have known of the trusteeship although they might not have had an opportunity to have it explained so that they would

be able to put it in proper perspective vis-a-vis their reasons for voting for a union.[1]

Had the notice of trusteeship been received on the day following the union's victory at the polls, it would be highly unlikely that a rerun election would be proper. Furthermore, there would be no rerun available for employees one month, six months, and so forth, after election if their local were to be put in trusteeship. There would, of course, be the opportunity for decertification petitions once the certification year had elapsed. But for a significant period, these union members have to live with the trusteeship.

The employer argues that only with the trusteeship could the employees learn of the internal problems within this union. At least as far as this local goes, we find that difficult to accept. First, under the Board's view of elections and election campaigns, the employer is charged with the responsibility of bringing factors adverse to unionization to the attention of the voters. Thus, in the normal case employers will have exploited all known weaknesses in a local union's internal affairs. This local had been constantly beset by strife. Only a few years earlier it had been placed in trusteeship by the International for internal problems. There seems no doubt here that the company should have or should have had ample evidence of internal problems in this union to bring to the voters' attention. Thus, the imposition of the trusteeship under these circumstances was somewhat anticlimactic.

The Board fears implementation of an affirmative disclosure rule would create a difficult administrative

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1. It might be interesting to speculate about the Board's reaction had the word of the trusteeship gotten out on election eve without the opportunity for an explanation of its scope by the union. In such a case, the Board might be tempted to order a rerun election to give the union time to explain. Such a position, however, would seem to conflict with this case.

burden and be of doubtful value. We agree that there would be great difficulty in assessing what types of information should or should not have to be disclosed by either union or management during an election campaign. Furthermore, such a rule would give losing parties even more reason and a new method to fight an adverse outcome at the polls. This would also add even more to the great delay which often accompanies election of a bargaining representative because of drawn out court battles over oft-times frivolous claims.

While the imposition of a trusteeship has serious consequences which have resulted in strict controls being imposed by Congress, in many important ways the local membership is not affected. The former heads of a local are generally replaced but the membership still retains its vote on contract terms and strikes. The trusteeship is designed to be temporary in nature, ceasing when the local's affairs have been sufficiently straightened out to allow it to return to a great degree of self-government.

The Board also seems to have relied on a feeling that election procedures and evaluation of various campaign propaganda statements illustrate that the choice of a local would be basically irrational. Furthermore, the Board maintains that generally the employees are only interested in obtaining better benefits and conditions from collective action while at the same time weighing possible harm from long strikes or loss of good relations with management. Therefore, the Board argues that the imposition of a trusteeship which still allows these basic roles to be maintained has relatively little impact on employee voting. To support this thesis the Board points to articles which have dealt with the difficulties of unions in getting members to attend meetings and take an active part in union affairs.

Thus, the Board has determined that imposition of a last-minute trusteeship prior to an election is such an in-

significant occurrence that it will not justify a rerun election where the union prevails. Since this situation falls outside the Board's normal rule involving affirmative misrepresentations with no time to reply, the Board, after weighing the many complex competing interests, has decided that a new rule requiring a rerun election under these circumstances is of doubtful value and would create undue hardship.

As noted, this is indeed an extremely close question. It appears to the court that employees should have the right to know prior to voting for a union that at least for a short time actual control of the day to day administration of the local was to be handled by a representative of the International, not by those people when the employees had understood to be the heads of the local. On the other hand, we fully recognize the administrative difficulties which would follow from a rule designed to cover this case. Furthermore, we agree that recalcitrant employers would take advantage of the situation and file meaningless challenges in an effort to further delay implementation of the desires of the employees. Since ours is not a duty to resolve these intricate competing interests but only to review the initial decision of the administrative body, we do not feel we have to analyze and balance these competing factors in detail. The Board is given broad discretion in representation matters and in ordering rerun elections. We are convinced that the Board has given close consideration to the competing positions in this case and has exercised its broad discretion in making a policy decision based on a choice between fairly equal but competing considerations.

Since we find that the Board did not abuse its discretion in failing to require a rerun election, we must find that the refusal to bargain with the union was a violation of the National Labor Relations Act and the Board's order is

ENFORCED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2810

FLORIDA MINING & MATERIALS CORP.
d/b/a McCORMICK CONCRETE COMPANY,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board (Florida Case)

On Petition for Rehearing and Petition for Rehearing en banc

(Opinion July 12, 1973, 5 Cir., 1973, ... F.2d .....).

(October 24, 1973)

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2810

FLORIDA MINING & MATERIALS CORP.
d/b/a McCORMICK CONCRETE COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Judgment

Before: TUTTLE, GODBOLD and MORGAN, Circuit Judges.

THIS CAUSE came on to be heard upon a petition for review, and on a cross-application for enforcement of, an order of the National Labor Relations Board issued on July 31, 1972, against Florida Mining & Materials Corp. d/b/a McCormick Concrete Company, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on April 23, 1973, and has considered the briefs and transcript of record filed in this cause. On July 12, 1973, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Petitioner, Florida Mining & Materials Corp. d/b/a McCormick Concrete Company, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: November 1, 1973.

APPENDIX C

APPLICABLE STATUTES AND REGULATIONS

National Labor Relations Act

29 U.S.C. § 9—

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

* * *

(c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a). . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Labor-Management Reporting and Disclosure Act

29 U.S.C. § 411. Bill of rights; constitution and bylaws of labor organizations

(a) (1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot.

* * *

SUBCHAPTER IV.—TRUSTEESHIPS

29 U.S.C. § 461. Reports—Filing and contents; annual financial report

(a) Every labor organization which has or assumes trusteeship over any subordinate labor organization shall file with the Secretary within thirty days after September 14, 1959 or the imposition of any such trusteeship, and semiannually thereafter, a report, signed by its president and treasurer or corresponding principal officers, as well as by the trustees of such subordinate labor organization, containing the following information: (1) the name and address of the subordinate organization; (2) the date of establishing the trusteeship; (3) a detailed statement of the reason or reasons for establishing or continuing the trusteeship; and (4) the nature and extent of participation by the membership of the subordinate organization in the selection of delegates to represent such organization in regular or special conventions or other policy-determining bodies and in the election of officers of the labor organization which has assumed trusteeship over such subordinate organization. The initial report shall also include a full and complete account of the financial condition of such subordinate organization as of the time trusteeship was assumed over it. During the continuance of a trusteeship

the labor organization which has assumed trusteeship over a subordinate labor organization shall file on behalf of the subordinate labor organization the annual financial report required by section 431(b) of this title signed by the president and treasurer or corresponding principal officers of the labor organization which has assumed such trusteeship and the trustees of the subordinate labor organization.

* * *

29 U.S.C. § 462. Purposes for establishment of trusteeship

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

SUBCHAPTER V.—ELECTIONS

29 U.S.C. § 481. Terms of office and election procedures—Officers of national or international labor organizations; manner of election

(a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

Officers of local labor organizations; manner of election

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

* * *

Nomination of candidates; eligibility; notice of election; voting rights; counting and publication of results; preservation of ballots and records

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election.

29 U.S.C. § 504. Prohibition against certain persons holding office; violations and penalties

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

> (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization.

* * *

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in clause (1) or (2) would not be contrary to the purposes of this chapter.

* * *

Rules and Regulations of the National Labor Relations Board, Series 8, As Amended

29 C.F.R. Sec. 102.69 Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.—

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. . . . If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in subsections (c) and (e) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith.

SUPREME COURT, U. S.

No. 73-902

FILED
MAR 6 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

FLORIDA MINING & MATERIALS CORP.,
d/b/a McCORMICK CONCRETE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 40-50) is reported at 481 F. 2d 65. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 28-39) are reported at 198 NLRB No. 81. The Regional Director's report on objections (Pet. App. 15-24) and the Board's decision (Pet. App. 25-27) in the underlying representation election proceeding are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 52) was entered on November 1, 1973. The petition for a writ of certiorari was filed on December 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board properly found that a local union's failure to disclose that it had been placed in a temporary trusteeship on the day before a representation election was insufficient grounds for setting aside the election.

2. Whether the Board properly refused to hold an evidentiary hearing on the employer's objections to the election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act and the Board's Rules and Regulations are set forth at Pet. App. 53 and 59.

STATEMENT

A. The Proceedings Before the Board

On August 17, 1971, the Board's Regional Director approved a Stipulation for Consent Election, executed by the Company and Local 512,[1] and scheduled an election for September 23, which Local 512 subsequently won (Pet. App. 15-16). The day before the election, Local 512 received notice from the International Union that it had been placed under temporary trusteeship pending a hearing to consider evidence on whether the trusteeship should be continued or dissolved (Pet. App. 19; A. 28-29).[2]

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[1]Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

[2]"A." refers to the appendix to the briefs in the court below.

After the election the Company filed timely objections, alleging that Local 512 had been placed in trusteeship the day before the election "without the knowledge or consent of [the unit employees]"; that in light of the trusteeship the Union had misrepresented that it "could adequately represent the employees"; and that the unit employees, when they voted, "erroneously assumed that they were casting their ballots for or against a certain labor organization * * * not under trusteeship" (Pet. App. 16-18; A. 16-17). Pursuant to Section 102.69(c) of the Board's Rules and Regulations (Pet. App. 59), the Regional Director conducted an administrative investigation, which revealed the following:

After the imposition of the temporary trusteeship, Local 512 continued its normal operations—*i.e.*, it continued to administer its contracts and to process grievances, including those filed before the trusteeship; it continued to refer employees to employers seeking drivers; and it continued to pay the salaries of its employees and to make payments on its debts (Pet. App. 20-21). At the time of the election, those Local 512 agents who were active in the campaign still held their positions. Although the trustee removed all the officers and business agents from their positions during the week following the election, one such agent, who was active in the election campaign, was rehired after two days and continued his usual functions (Pet. App. 21). Finally, at the hearing on the imposition of the trusteeship, the trustee recommended that the existence of Local 512 as a distinct local be maintained in light of the wishes of its membership (Pet. App. 20).

Based upon the foregoing, the Regional Director concluded that "Local 512, although presently under a trusteeship, is nonetheless continuing to function as Local 512, and as a part of the Teamsters Union," and that it "was able and willing both before and after imposition of trusteeship, to represent employees as their bargaining representative with respect to this [Company]" (Pet. App. 22). He therefore recommended that Local 512 be certified (Pet. App. 23-24). The Company's subsequent exceptions to the Regional Director's report (A. 22-23) were overruled by the Board, which adopted the Director's findings and recommendations and certified Local 512 (Pet. App. 25-27).

The Company thereafter refused Local 512's requests to bargain. In the ensuing unfair labor practice proceeding, the Board granting the General Counsel's motion for judgment on the pleadings, held that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 512 (Pet. App. 33-34). The Board's order requires the Company, *inter alia*, to bargain with Local 512 upon request (Pet. App. 37).

B. The Decision of the Court of Appeals

The court of appeals enforced the Board's order. It accepted "the Board's finding that this union was able to represent these employees while in trusteeship and that any statements prior to the imposition of the trusteeship which indicated that the union could adequately represent these employees could not be considered material misrepresentations" (Pet. App. 47).

The court further held that it was not unreasonable for the Board to conclude that imposition of the trusteeship on the eve of the election was not such a

significant event as to require that the election be set aside because of the Union's failure to disclose it. The court pointed out that "[t]his local had been constantly beset by strife," that only "a few years earlier it had been placed in trusteeship by the International for internal problems," and that therefore "the imposition of the trusteeship under these circumstances was somewhat anticlimactic" (Pet. App. 48). The court added (Pet. App. 49):

> While the imposition of a trusteeship has serious consequences which have resulted in strict controls being imposed by Congress, in many important ways the local membership is not affected. The former heads of a local are generally replaced but the membership still retains its vote on contract terms and strikes. The trusteeship is designed to be temporary in nature, ceasing when the local's affairs have been sufficiently straightened out to allow it to return to a great degree of self-government.

ARGUMENT

1. The basic question which petitioner seeks to present (Pet. 7-12)—whether the representation election should have been set aside because of the undisclosed imposition of a trusteeship on the day before the election—"may well be a unique problem" (Pet. App. 47). As the court below pointed out (Pet. App. 47-48):

> Had the trusteeship been imposed a day or two sooner its existence would have almost certainly been publicly known prior to the election. * * *

> Had the notice of trusteeship been received on the day following the union's victory at the polls, it would be highly unlikely that a rerun election would be proper. Furthermore, there would be no rerun available for employees one month, six months, and so forth, after election if their local were to be put in trusteeship. * * *

Moreover, the Board and court found that, despite imposition of the trusteeship, Local 512 was fully able to perform its functions as a bargaining agent and that therefore its failure to disclose the trusteeship did not constitute a misrepresentation of its ability to represent the employees. The court further found that the Local's internal problems which led to the trusteeship were well known, and thus lack of disclosure thereof did not prevent the employees from knowing about the Local's difficulties.[3]

In these circumstances, the Board was warranted in concluding that the failure of Local 512 to disclose the trusteeship before the election did not vitiate the election results. In any event, the issue does not warrant further review because it is "a unique problem" (Pet. App. 47) unlikely to recur.

2. There is no merit to petitioner's additional contention (Pet. 12-13) that it was improperly denied an evidentiary hearing on its objections to the election. Petitioner tendered to the Board, in support of its exceptions to the Regional Director's ruling on its

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[3]At the time of the election, Local 512 knew only that its parent body was imposing a temporary trusteeship until a hearing could be held to examine the Local's internal difficulties. The Local did not then know whether, or to what extent, its officers and agents, who were still functioning, would be removed by the trustee (*supra*, p. 3).

objections, a form affidavit signed by three employees wherein they stated that they had voted for the Local but would not have done so if they "had been told before the election that the Local had been taken over by the International Teamsters in a trusteeship" (A. 46). The affidavit also stated: "We had understood that there was going to be a meeting the night of September 22, the night before the election. This meeting was cancelled" (*ibid.*).

Insofar as the affidavit described the employees' subjective reasons for voting, it is "unreliable." *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 608. Insofar as the affidavit was intended to show that the Local had concealed the trusteeship by cancelling a scheduled meeting on the eve of the election, it was untimely. The Board's Rules (29 C.F.R. 102.69(a)) require that objections must be filed within 5 days after the tally of ballots is issued, and that the objecting party shall promptly furnish to the Regional Director the evidence available to it ot support the objections. Petitioner did not furnish the affidavit to the Director—although the information therein was available—but instead waited until the Director had ruled, and then filed the affidavit in its exceptions to the Board.

Moreover, the objections which petitioner did file with the Director (Pet. App. 16-19, A. 16-17) merely asserted that the trusteeship was imposed without the em ployees' knowledge or consent, that the trusteeship rendered Local 512 incapable of adequately representing the employees, and that in casting their ballots the employees anticipated being represented by particular union officials. Since the facts bearing on these

contentions were undisputed, the Regional Director properly concluded that a hearing was unnecessary (Pet. App. 23).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

PAUL J. SPIELBERG,
Attorney,
National Labor Relations Board.

MARCH 1974.

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[4]The court below added that, in any event, it "seriously doubt[ed]" whether the cancellation of a scheduled union meeting would constitute "a material misrepresentation under the circumstances of this case" (Pet. App. 46-47).